

Bail Slip

The Appellants/Accused-1 Viz., Sivakumar and 2. Logu @ Loganathan, are directed to be released on bail as per ordered of this court dated 20.7.2015, made in MP.No.1/15, in Crl.A.No.307 of 2015; and

This appellant/4th Accused, viz., Selvaraj to directed to be released on bail as per ordered of this Court dated 02.07.2015, made in MP.NO.1/2015, in Crl.A.No.343 of 2015.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 14.06.2016

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR. JUSTICE V.BHARATHIDASAN

CRL.A.Nos.307 of 2015 and 343 of 2015

1. Sivakumar

2. Logu @ Loganathan

Selvaraj

..Appellants in C.A.No.307/2015/A2andA3

..Appellant in C.A.No.343/2015/A4

Vs

State by

The Inspector of Police,

Anthiyur Police Station,

Erode District.

(Crime No.620/2012)

..Respondent/Complainant

Appeals filed u/s.374 Cr.P.C., against the Judgment of conviction and sentence passed by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahalir Court), Erode, made in S.C.No.34 of 2014 dated 18.05.2015.

For Appellants in C.A.No.307/2015 :Mr.N.Manokarn

For Appellant in C.A.No.343/2015 :Mr.A.K.Kumaraswamy

For Respondent in both Appeals

:Mr.M.Maharaja,

Addl. Public Prosecutor

C O M M O N J U D G M E N T

[Judgment of the court was delivered by S.NAGAMUTHU, J.]

The appellants are accused 2 to 4 in S.C.No.34 of 2014 on the file of the learned Sessions Judge, Mahila Fast Track Court, Erode. The 1st accused is one Velumani. Since it was found that the 1st accused Velumani was a Juvenile in conflict with law as on the date of the commission of the crime, the case against him was split up and the same was referred to the Juvenile Justice

Board, Erode and it is still pending enquiry. The trial court framed charges against the accused 2 and 3 under Section 366 read with 109 of IPC and against the 4th accused under Section 368 of IPC. The accused denied the charges. On the side of the prosecution, the mother of the victim was examined as P.W.1 on 15.10.2014 and she was examined by the Counsel for all the 3 accused. On the same day, the victim was examined as P.W.2. During such examination, it came to light that as on the date of the commission of the crime, P.W.2 was a child as defined in Section 2(d) of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as, 'the Act'). Therefore, recording the evidence was stopped and P.W.2 was not allowed to be cross-examined by the defence.

2. Thereafter, the trial court framed additional charges on 03.11.2014 as against the accused 2 to 4 under Section 4 read with Section 16 of the Act. The accused 2 to 4 denied the additional charges as well.

3. P.Ws.1 and 2 were recalled and cross-examined by the defence. On the side of the prosecution, apart from P.Ws.1 and 2, as many as 11 witnesses were examined.

4. By judgment dated 18.05.2015, the trial court convicted the accused 2 and 3 under Sections 366 read with 109 IPC, Section 4 read with 16 of the Protection of Children From Sexual Offences Act, 2012 and sentenced them to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- each, in default, to undergo simple imprisonment for 6 months for the offence under Section 366 read with 109 of IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs.5,000/- each, in default, to undergo simple imprisonment for 6 months for the offence under Section 4 read with 16 of the Protection of Children From Sexual Offences Act, 2012 and the trial court has convicted the 4th accused under Section 368 of IPC and Section 4 read with 16 of the Protection of Children From Sexual Offences Act, 2012 and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for 6 months for the offence under Section 368 of IPC and to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for 6 months for the offence under Section 4 read with 16 of the Protection of Children From Sexual Offences Act, 2012. Challenging the same, the appellants are before this Court with these appeals.

5. According to P.W.1, on 26.12.2012, around 9.00 p.m., P.W.2 (the victim girl), who had gone to a nearby garden to answer the nature's call did not return. He went in search of her. But he could not locate her anywhere. When he came to know that she was kidnapped by the Juvenile Velumani, on

29.12.2012, he made a complaint to the police. P.W.8, the then Sub-Inspector of Police, on receipt of the said complaint, registered a case in Crime No.620 of 2012 under Section 366-A of IPC. Ex.P.1 is the complaint and Ex.P.6 is the First Information Report. She forwarded both the documents to court which were received by the learned Magistrate at 03.00 p.m. on 02.01.2013.

6. Though P.W.11, the then Inspector of Police, Anthiyur Police Station, examined many witnesses, he was not able to make a break through immediately. On 02.01.2013 around 07.30 a.m., according to him, he had information that the Juvenile accused Velumani and the victim (P.W.2) were standing at Puthupalayam Bus Stand. Immediately, he rushed there. At 08.00 a.m., he found Velumani and the victim there. He arrested Velumani and took P.W.2 in his custody. At 08.30 a.m., he returned to the police station.

7. When he enquired the victim as to what had happened to her, she gave a written statement. He examined her orally and recorded her statement under Section 161 of Cr.P.C. At that time, she told P.W.11 that she was kidnapped by Velumani with the help of the accused 2 and 3. She has further stated that the 4th accused took her and Velumani to a house where she was kept. She further told that the juvenile Velumani had sexual intercourse with her repeatedly. Based on the said statement, P.W.11 altered the case into one under Sections 366-A and 376 of IPC.

8. He forwarded the accused Velumani to court and through court, he was sent for medical examination. P.W.9 Doctor Priya examined Velumani on 03.01.2013. She found that he was potent and capable of performing sexual intercourse with a woman. Ex.P.7 is the Certificate issued by her.

9. P.W.11 produced P.W.2 before the learned Judicial Magistrate and at his request, the learned Magistrate sent her for medical examination. P.W.10 Doctor Nansi Thanu examined P.W.2 at Government Hospital, Erode. She told the Doctor that against her consent, she was subjected to sexual intercourse by a known person. She found that P.W.2 was sexually grown up and hymen was not intact. Her vaginal cavity freely allowed two fingers to enter. The vaginal smear taken, which was subjected to chemical examination, revealed that there was no spermatozoon. Therefore, she gave opinion that there was no sign of any recent sexual intercourse.

10. P.W.11 collected the medical records, examined the Doctor and recorded her statement and laid charge sheet against the accused on 29.09.2013 under Sections 366, 366 read with 109 and 376 (1) of IPC.

11. In order to prove the case, on the side of the prosecution, as we have already pointed out, 11 witnesses were examined and 19 documents were marked.

12. Out of the said witnesses, P.W.1, the father of the victim has stated that the victim was found missing from 26.12.2012 at 09.00 p.m. onwards. She has further stated about the complaint made by him. P.W.2, the victim, has stated that on 26.12.2012 at 09.00 p.m., when she went to a nearby garden from her house to answer nature's call, the juvenile Velumani accompanied by the accused 2 and 3 came there. The juvenile Velumani wanted her to marry him. She bluntly refused. He told that he would commit suicide, if she did not come with him. Then, the accused 2 and 3 by force put her on the pillion of the Motor Cycle bearing Registration No.36 AY 2354. Velumani drove the vehicle carrying the victim. The accused 2 and 3 followed them in another motorcycle. All the 3 accused took the victim girl to Ramapuram Village to the house of the 4th accused. The 4th accused is none other than the uncle of the juvenile Velumani. After leaving the juvenile Velumani and the victim to the custody of the 4th accused, the accused 2 and 3 left the place.

13. Thereafter, the 4th accused took Velumani and the victim to Kollekall village. He told that he would arrange for marriage between them. At Kollekall, the juvenile Velumani had repeated sexual intercourse with the victim between 27.12.2012 and 31.12.2012 by force and without her free consent. On 31.12.2012, P.W.2 insisted that she should go home. Thereafter, the juvenile Velumani took the victim on 01.01.2013 and came to Anthiyoor Puthupalayam Bus Stand on 02.01.2013. P.Ws.3 and 4, who are the mother and brother of the victim girl, have stated about the missing of the victim. P.W.5 has stated that the police wanted him to sign a paper which he did. He has not stated anything incriminating against the accused. P.W.6 has spoken about the preparation of the Observation Mahazar and the Rough Sketch. P.W.7 has stated that he examined the juvenile Velumani on 04.01.2013 to ascertain his age. He conducted medical examination by taking X-Ray. He found that he had completed 16 years of age, but not completed 18 years of age. Ex.P.5 is the Certificate. P.W.8, the then Sub-Inspector of Police has spoken about the registration of the case. P.W.9 Dr.Priya has stated that on her examination, she found that the juvenile Velumani was capable of performing sexual intercourse with a woman. P.W.10 has stated that she examined the victim on 03.01.2013 and found that she was sexually fully grown up. The hymen in the vaginal cavity was found ruptured. The vaginal smear taken proved that there was no spermatozoon. According to her, there was no sign of recent sexual intercourse. P.W.11 has spoken about the investigation done and his final report.

14. When the above incriminating materials were put to the accused 2 to 4 u/s.313 Cr.P.C., they denied the same as false. Their defence was a total denial. On their side, one Mrs.Rani, the then Judicial Magistrate No.I, Gobichettipalayam was examined as D.W.1. Through her, Exs.P.17 to 19, namely, the statements recorded by her from P.Ws.1 to 3 respectively were marked. Having considered all the above, the Trial Court convicted the accused 2 to 4 as detailed in the first paragraph of the judgment. Challenging the said conviction and sentence, the appellants are before this Court.

15. We have heard the learned Counsel for the appellants and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

16. The prosecution, in this case, mainly relies on the evidences of P.Ws.1 to 4. P.Ws.1, 3 and 4 have stated that the victim P.W.2 was found missing from 09.00 p.m. on 26.12.2012 onwards. They have stated that when the victim girl had gone to a nearby garden to answer the nature's call, she did not return. P.W.2, the victim has also stated so. P.W.2 has further stated that the accused 2 and 3 assisted the juvenile accused Velumani to take her in a motorcycle to the house of the 4th accused. She has further stated that the 4th accused took Velumani and P.W.2 the victim to Kollekall to arrange for marriage between them. She has further stated that at Kollekall, the juvenile accused Velumani had sexual intercourse with her repeatedly without her free consent between 27.12.2012 and 31.12.2012.

17. The learned Counsel for the appellants would submit that the evidence of these witnesses are liable to be rejected in view of the evidence of D.W.1 and Exs.P.17 to 19. The learned Counsel would further submit that Ex.P.17 the statement recorded by the learned Magistrate from P.W.1 was duly used to contradict P.W.1, when he was examined in court and similar statements recorded by D.W.1 from P.Ws.2 and 3 were used to contradict them respectively. The learned Counsel for the appellants would also submit that in view of the total contradictionary statements made at the earliest point of time by P.Ws.1 to 3, the present version is only an improvement and therefore, the same is liable to be rejected.

18. The learned Additional Public Prosecutor would submit that in this case, since there is a charge under Section 16 of the Protection of Children From Sexual Offences Act, 2012 Act, the presumption under Section 29 of the said Act is to be necessarily raised against the accused. The said presumption, according to him, has not been rebutted. Thus, according to him, the prosecution has proved the case beyond all reasonable doubts.

19. We have considered the above submissions.

20. As rightly pointed out by the learned Counsel for the appellants, at the earliest point of time, in Ex.P.17 to Ex.P.19, P.Ws.1 to 3 have stated that P.W.2 on her own accord had gone to the house of her Aunt's daughter at Erode. They have further stated that from her house, she was taken by the police. She has not stated that she was kidnapped by the juvenile and the accused 2 and 3 and she has not stated that the juvenile accused had sexual intercourse with her. P.Ws.1 to 3 have also made similar statements under Ex.P.17 to Ex.P.19. Of course Ex.P.17 to Ex.P.19 cannot be treated as substantive evidence as they are only former statements of these witnesses on oath. As Rightly provided under Section 145 of the Indian Evidence Act, the accused have used the same to contradict the maker of the respective statement and the said contradiction has also been proved. Thus, the defence has proved that at the earliest point of time, P.Ws.1 to 3 have stated that P.W.2, on her own accord, had gone to Erode to the house of her aunt's daughter. In view of the said material contradictions, the credibility of P.Ws.1 to 3 is lost and therefore, they cannot be believed.

21. Now turning to Section 29 of the POCSO Act, of course, presumption of guilt shall be raised against the accused against whom the prosecution has been launched under the Act. But such presumption is rebuttable. In the instant case, by proving the contradictions between Ex.P.17 to Ex.P.19 and the evidence of P.Ws.1 to 3, the defence has rebutted the said presumption. Thus, in our considered view, the prosecution has failed to prove the case beyond all reasonable doubts.

22. In the result, the Criminal Appeals are allowed and the conviction and sentence imposed on the appellants/accused 2 to 4 are set aside and they are acquitted. The bail bonds, if any, executed by the appellants, shall stand cancelled. The fine, if any, paid by the accused, shall be refunded to the respective accused.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

q. The Judicial Magistrate Bhavani.

2. The Chief Judicial Magistrate, Erode.

3. The Inspector of Police,
Anthiyur Police Station,
Erode District.

4. The Sessions Judge,
Mahalir Fast Track Court,
Erode.

5. The Public Prosecutor,
High Court, Chennai.

6. The Superintendent Central Prison, Coimbatore.

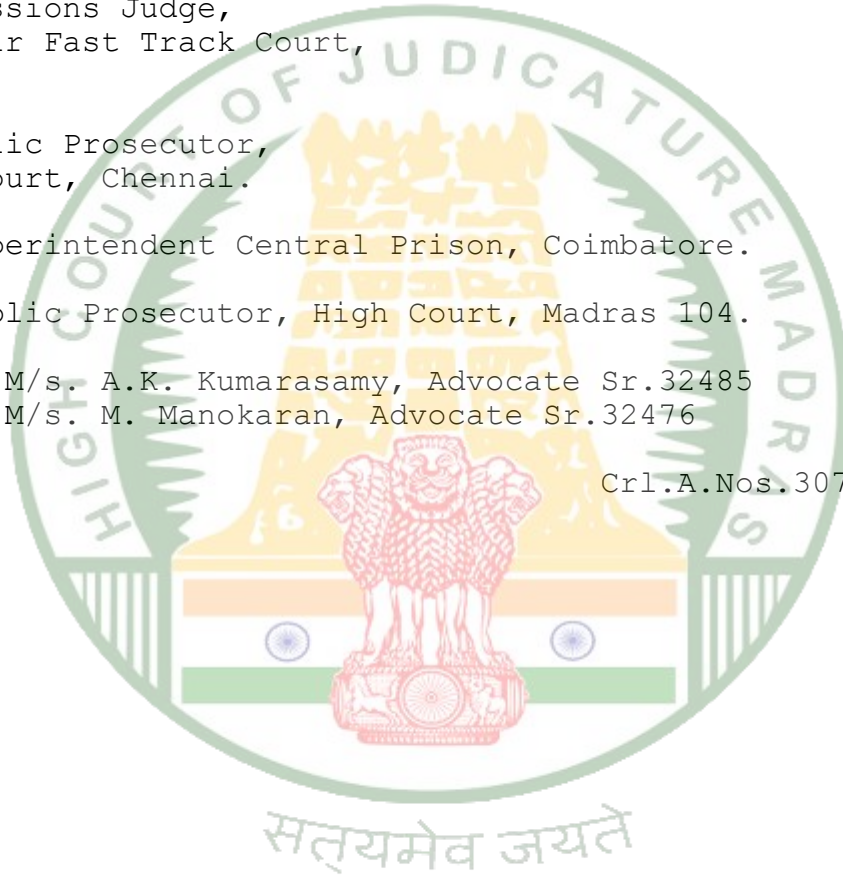
7. The Public Prosecutor, High Court, Madras 104.

+ 1 cc to M/s. A.K. Kumarasamy, Advocate Sr.32485

+ 1 cc to M/s. M. Manokaran, Advocate Sr.32476

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